

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3438

Heard in Edmonton, Tuesday, 13 July 2004

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION

EX PARTE

DISPUTE:

Discharge of Mark Gibson.

UNION'S STATEMENT OF ISSUE:

Mark Gibson was working as conductor on train 312 on October 3rd, 2003. Mr. Gibson was required to pick up 21 cars out of CS56 and double them onto his outbound train. Mr. Gibson picked up the cars however, after doubling them to the train, communication could not be established with the tail end. The Carmen were called and, after a twenty minute inspection, found a closed angle cock on the cars picked up by Mr. Gibson. The angle cock was opened, communication was established and the train departed without incident.

Later, some 400 miles down the road at Melville, Saskatchewan, a handbrake was found on one of the cars that had been picked up on Edmonton.

Following an investigation, Mr. Gibson was dismissed for delay to train, violation of GOI 5.7(c) and violation of his return to work contract.

The Union contends that the Company has failed to demonstrate that Mr. Gibson was in fact responsible for the handbrake found in Melville. Further, the Union contends that any delay attributable to Mr. Gibson's actions was exacerbated by further Company actions and, finally, that Mr. Gibson did not intentionally violate his contract. The Union requests that Mr. Gibson be reinstated, without loss of seniority and made whole for all wages and benefits lost. Further, the Union requests that this incident be expunged from Mr. Gibson's record.

The Company disagrees.

FOR THE UNION:

(SGD.) R. A. HACKL

FOR: GENERAL CHAIRPERSON

There appeared on behalf of the Company:

- D. Brodie – Manager, Labour Relations, Edmonton
- R. Reny – Sr. Manager, Human Resources, Edmonton
- J. Hunder – Counsel, Edmonton
- T. Brown – Superintendent, Edmonton
- R. Shulha – Account Manager, Edmonton

And on behalf of the Union:

- D. Ellickson – Counsel, Toronto
- R. A. Hackl – Vice-General Chairperson, Edmonton
- J. W. Armstrong – Vice-President, UTU-Canada, Edmonton
- Wm. Witwicky – Vice-Local Chairperson, Kamloops
- M. Gibson – Grievor

AWARD OF THE ARBITRATOR

The material before the Arbitrator reveals that the grievor registered a very negative disciplinary record, particularly in the years between 1999 and 2002. That resulted in his discharge for the accumulation of demerits on June 14, 2002. Subsequently Mr. Gibson was reinstated under the terms of a reinstatement contract, to which his Union was a party, dated August 13, 2003. That agreement contains, in part, the following provisions:

6. You must ensure full compliance with all operating safety regulations and rules at all times.

...

10. You acknowledge that anything less than full compliance with all conditions of this reinstatement/continuing employment contract will result in the gravest of consequences.

The grievor was discharged following an investigation relating to the performance of his duties on train 312 on October 3, 2003. The Company concluded that the grievor committed two errors on the date in question. The first was to leave an angle cock closed after doubling a cut of cars onto his outbound train. When the grievor returned to the head end of his train his locomotive engineer indicated that it did not appear that the air had gone all the way through to the tail end of the movement. As the grievor had been responsible for connecting the hoses and cutting in the air, he indicated that he was unaware why there should be a problem. The Car Department was called to inspect the train and after some twenty minutes a closed angle cock was found. In the circumstances the Company maintains that the grievor was responsible for the delay of the train.

The second aspect of the investigation relates to the Company's allegation that the grievor failed to release a handbrake on the fifth car in a cut of seventy-two cars the grievor had tied onto his train when doubling over in Walker Yard. The problem was discovered when a hot wheel was detected as the same movement was later being handled by another crew operating from Biggar to Melville.

In the Arbitrator's view the evidence does sustain, on the balance of probabilities, that the grievor was responsible for the closed angle cock discovered by the Car Department when his train was preparing to depart from Edmonton to Wainwright on October 2, 2003. With respect, however, the Arbitrator has some difficulty with the Company's submission that the evidence confirms to the same standard of certainty

that he was responsible for the failure to release the handbrake which caused the hot wheel to be detected the next day after the car in question had travelled over some five hundred miles, with several stops along the way. At best what the Company advances in respect to that aspect of the case is circumstantial evidence which is equally consistent with culpability and innocence on the part of the grievor, given that there can be no certainty as to what may have happened to the car during the relatively extensive period of time and distance which elapsed before the hot wheel was finally detected. The record discloses that the train travelled over some twenty-one hot box detectors without incident, before the problem was detected at or near Melville. While the Company may well have suspicions as to the cause of the hot wheel, as noted in prior awards of this Office, a board of arbitration bound by the rules of evidence cannot responsibly convert suspicion into legal conclusions.

What, then, does the whole of the record disclose? Firstly, as noted by the Union's representative, the grievor's negative disciplinary record seems to have been amassed during a period of some two to three years during which time his late wife was terminally ill, until her death in May of 2001. Additionally, the incident in respect of the angle cock occurred only after some twelve tours of duty following the grievor's return to work, after an absence of some fifteen months.

Upon a review of the whole of the record the Arbitrator is satisfied that the discharge of the grievor was excessive, based solely of the issue of the missed angle cock. It is noteworthy that the reinstatement agreement leaves some room for

discretion, referring only to the “gravest of consequences” in the event of a future problem. The Arbitrator accepts the submission of the Union that the grievor, who has twenty years of service, did maintain a relatively positive disciplinary record prior to the period in time surrounding the terminal illness and death of his spouse. There are also grounds for concern as to whether he was given a sufficient opportunity of reorientation upon his return to service. On the whole, I am satisfied that this is an appropriate case for a reinstatement, albeit without compensation.

The grievance is therefore allowed in part. The Arbitrator directs that the grievor be reinstated into his employment forthwith, without loss of seniority and without compensation for any wages and benefits lost. The Company is directed to permit the grievor a period of reorientation upon his reinstatement of not less than the equivalent of fifteen full tours of duty. He shall otherwise continue to be subject to the terms of the contract of reinstatement dated August 13, 2003, with an adjustment in the duration of that agreement to be made accordingly.

July 20, 2004

(signed) MICHEL G. PICHER
ARBITRATOR